

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE DANIEL WHITE,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2007

No. 269156

Kent Circuit Court

LC No. 05-007793-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his first-degree criminal sexual conduct conviction, MCL 750.520b(1)(f), and his sentence of 8 to 40 years' imprisonment. We affirm his conviction, but remand for resentencing.

Defendant first argues that he was denied his constitutional right to the effective assistance of counsel at trial because his counsel failed to thoroughly cross-examine the sexual assault nurse examiner who examined the victim. After review of this unpreserved claim for mistakes apparent on the record, we disagree. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms, that counsel's deficient performance prejudiced the defense, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Id.* at 302.

Here, in particular, defendant claims that his counsel was ineffective for failing to confront the nurse with scientific research that undermined her conclusions and for failing to challenge her testimony with the conclusions reached by the forensic pathologist retained by trial counsel, i.e., that the abrasion the victim suffered could have been the result of consensual sex. But, the record clearly reveals that trial counsel cross-examined the nurse examiner, during which she admitted, as she had on direct examination, that the abrasion could have been caused by consensual sex. The decision to question the nurse examiner further, using contradictory scientific research and the forensic pathologist's conclusions, is a matter of trial strategy which

this Court will not second-guess with the benefit of hindsight. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant next argues that he is entitled to resentencing because OV 3 and OV 4 were erroneously scored. After review of the evidence purportedly in support of the scoring decisions, we agree. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

First, we consider the scoring of OV 3, which was scored at five points. MCL 777.33 pertains to personal injury and requires that five points be scored for a bodily injury not requiring medical attention inflicted on the victim, unless such injury is an element of the sentencing offense. Here, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f), an element of which is personal injury. The victim's only injury, as defined by MCL 750.520a(1), apparent from the record is a vaginal abrasion. Because this injury established an element of the offense, the scoring of five points for OV 3 was in error. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Second, the trial court also erroneously scored OV 4 at ten points. MCL 777.34(1) requires that ten points be scored when a defendant inflicts serious psychological injury upon the victim which required or may require professional treatment. Here, the PSIR contains the victim's statement that she believed she needed counseling, although she did not seek counseling. There is no formal Victim Impact Statement in the record, and the victim did not testify that she suffered emotional or psychological trauma. Although, "[s]coring decisions for which there is any evidence in support will be upheld," in this case the victim's brief reference to counseling is insufficient to support the scoring decision. See *Hornsby*, *supra*. The statement neither explained why the victim felt she needed counseling, nor identified any psychological trauma that would necessitate counseling. Thus the scoring of OV 4 at ten points was in error. Because the scoring errors affected defendant's sentencing guidelines range, he is entitled to resentencing based on correctly scored guidelines. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006); *People v Kimble*, 470 Mich 305, 309-312; 684 NW2d 669 (2004).

Next, in his Standard 4 brief, defendant argues that his counsel was ineffective for a number of reasons. Again, after review of these unpreserved claims for mistakes apparent on the record, we disagree. See *Rodriguez*, *supra*.

Defendant claims that he did not receive the effective assistance of counsel because his attorney failed to interview the prosecution witnesses, failed to investigate the case, and made no effort to prepare for trial. A defendant can overcome the presumption of effective assistance by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). But, here, defendant has neither presented evidence nor cited facts from the record that support these claims. To the contrary, it appears from the record that trial counsel was prepared for trial, adequately and competently cross-examined the prosecution witnesses, appropriately moved for a directed verdict, and elicited defendant's own testimony to form an affirmative defense. Defendant has failed to show that his counsel's representation was deficient under prevailing professional norms with regard to these claims. See *Toma*, *supra* at 302-303.

Defendant also claims that his counsel was ineffective for failing to call character witnesses to testify on his behalf. A defendant has the right to introduce character evidence at

trial. MRE 404(a)(1). However, the introduction of character evidence opens the door for the prosecution to present rebuttal character evidence that otherwise would be inadmissible. MRE 404(a)(1). According to defendant, trial counsel refused to call character witnesses in part because the prosecutor would have a “field day” with the character evidence. Thus, there was a legitimate reason for defense counsel not to present character evidence and such decision constituted sound trial strategy which we will not second guess. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant further argues that trial counsel rendered ineffective assistance because he failed to thoroughly cross-examine the victim about statements she made to the police that were inconsistent with testimony she gave at trial. Moreover, defendant alleges that trial counsel was ineffective for failing to call as a witness the police officer who took the victim’s statement to bring to light the inconsistencies. Defendant failed to identify the purported inconsistencies claimed on appeal. Furthermore, trial counsel adeptly and thoroughly cross-examined the victim and even questioned her about statements she made at the preliminary examination that were inconsistent with her trial testimony. In fact, the majority of trial counsel’s cross-examination consisted of questions about her inconsistent statements and faulty memory. Additionally, the failure to call the police officer did not deprive defendant of a substantial defense because trial counsel brought to light the victim’s inconsistent statements on cross-examination. See *id.*; *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Thus, this claim is without merit.

Defendant also argues that trial counsel was ineffective for failing to call as a witness the forensic pathologist who reviewed the victim’s medical reports. But the decision not to call a witness is presumed to be trial strategy and this decision did not deprive defendant of a substantial defense. See *id.* The nurse examiner admitted that the vaginal abrasion could have been a result of consensual sex and defendant himself testified that the sex was consensual. Further, testimony to this effect, although perhaps helpful, was not necessary for defendant to mount a defense to the charge. Therefore, defendant is not entitled to relief on this ground.

Lastly, defendant argues that trial counsel was ineffective for failing to review the PSIR and object to defendant’s score for OV 4. However, because we have already concluded that OV 4 was misscored and that resentencing is required, no further review or relief is warranted.

The final issue in defendant’s Standard 4 brief is his claim of prosecutorial misconduct which allegedly occurred during closing argument when the prosecution characterized defendant as a “womanizer,” and called him a “Don Juan” and a “Jerry’s Beacon.” Because no objection was made, appellate review is generally precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

In this case, appellate review is precluded. The prosecutor’s brief reference to “Don Juan” while arguing that defendant’s version of the events was illogical does not warrant relief. The prosecution had the right to respond to arguments raised by defense counsel and the prosecutor’s argument merely questioned the plausibility of defendant’s version of events. Although the remark is colorful, a curative instruction could have eliminated any prejudicial effect. See *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Moreover, after review of the prosecution’s closing argument we are unable to locate a statement characterizing

defendant as a womanizer, or the phrase “Jerry’s Beacon.” Therefore, these claims of misconduct are without merit.

Defendant’s conviction is affirmed, but the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen